STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 7, 2003
V OSCAR Y. HARRIS, Defendant-Appellant.	No. 232191 Wayne Circuit Court LC No. 99-007777

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V OSCAR Y. HARRIS, Defendant-Appellant.	No. 232192 Wayne Circuit Court LC No. 99-007776

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c) (sexual penetration occurring during the commission of a felony), three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e) (sexual penetration by an actor armed with a weapon), two counts of armed robbery, MCL 750.529, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, one count of carjacking, MCL 750.529a, and one count of kidnapping, MCL 750.349. We affirm defendant's convictions, but remand this case to the trial court to enter a corrected judgment of sentence.

I. Ineffective Assistance of Counsel

First, defendant argues that he was denied the effective assistance of counsel based on several alleged errors. We disagree.

Our review of defendant's ineffective assistance claim is limited to errors apparent on the record because no *Ginther*[1] hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant first claims that trial counsel was ineffective in failing to keep the two cases severed from each other. We disagree. The prosecution moved to present evidence of the incidents in one case as MRE 404(b) evidence in the other case, and the trial court subsequently granted the prosecution's motion. Following this ruling, defendant's attorney at that time[2], moved to join the cases and to try them simultaneously. The trial court granted this motion.

At trial, defense counsel attempted to distinguish between the crimes committed against the two victims, working on a theory that the victims had misidentified their attacker. Defendant challenges this strategy, speculating that the admission of such evidence would not have had the same prejudicial effect at separate trials as they might have had in these consolidated trials. Nevertheless, defendant does not assert that the "other acts" evidence was inadmissible. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). We find that trial counsel's decision to try the cases together in an attempt to distinguish the cases in support of defendant's theory of misidentification was not ineffective assistance.

Defendant next claims that he was deprived of effective assistance of counsel because defense counsel was allegedly unprepared for trial. The only basis for this allegation is the fact that trial counsel became involved in these cases approximately two months prior to trial. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). In the instant case, defendant has failed to demonstrate how he was prejudiced from trial counsel's alleged lack of preparation.

Next, defendant asserts, in propria persona, that trial counsel was ineffective because she failed to call certain witnesses at trial. Prior to jury voir dire, trial counsel advised the trial court that the day before trial defendant had requested that trial counsel present four witnesses at the trial. There is no evidence that defendant had requested any of his prior counsel to secure these witnesses for trial. In addition, the prosecution had not listed or endorsed these individuals as witnesses, and the record does not support defendant's assertion that they were res gestae witnesses. Accordingly, we cannot find that defendant has overcome the presumption that the decision not to request the trial court to permit these individuals to be added as witnesses on the first day of trial was trial strategy. *Leonard, supra* at 592.

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[2] Defendant was eventually represented by a total of five attorneys.

Defendant next argues, in propria persona, that trial counsel committed several errors regarding DNA evidence. First, defendant claims that trial counsel was ineffective because she failed to make a particularized showing of need for the appointment of a DNA expert when she requested such an expert, and that trial counsel failed to adequately cross-examine the prosecution's DNA expert. We disagree. In *Leonard*, *supra* at 583-584, this Court stated that "a defendant is not entitled to a DNA expert without making a particularized showing of a need for the expert." Here, defendant broadly asserts that such a particularized showing was not made. At trial, during the cross-examination of the prosecution's DNA expert, trial counsel elicited testimony that, although defendant could not be excluded as a donor, the report did not positively identify defendant as a donor either. The inconclusive results, therefore, neither bolstered nor detracted from defendant's or the prosecution's theory of the case. As defendant could not be positively identified or excluded as a contributor of the DNA material based on the testimony of the prosecution's expert witness, defendant has failed to demonstrate a particularized need for the appointment of a DNA expert. Further, defendant has failed to overcome the presumption that trial counsel's cross-examination of the DNA expert was sound trial strategy. *Leonard*, *supra* at 592.

Defendant next argues, in propria persona, that trial counsel was ineffective for failing to request statistical analysis evidence regarding the DNA evidence. In *People v Coy*, 243 Mich App 283, 301-302; 620 NW2d 888 (2000), this Court held that there must be some qualitative or quantitative interpretation or statistical analysis indicating the significance of a potential DNA match when DNA evidence is presented. Specifically, the *Coy* Court determined that expert witness testimony that the defendant's DNA was consistent with a mixed blood sample was inadmissible because there was no statistical evidence to clarify the significance of the possible DNA match. *Id*. However, the *Coy* Court emphasized that "by no means should our decision be construed to suggest that the admission of DNA testing evidence lacking the accompanying, interpretive statistical analysis in every case represents error requiring reversal." *Id*. at 313.

We find that the instant case may easily be distinguished from *Coy*, and that trial counsel's failure to request such statistical analysis did not deprive defendant of the effective assistance of counsel. In *Coy*, the sole purpose of the DNA evidence was to place the defendant at the scene of the murder. There was no testimony that positively put the defendant in the victim's apartment at the time of the murder. *Id*. at 304-305. In the instant case, the first victim testified that defendant jumped into her car and ordered her to drive at gunpoint. The victim drove to a secluded area, at defendant's direction, where defendant robbed and sexually assaulted her. These incidents took place during daylight hours. Finally, the victim was able to identify defendant in a photographic array, and also positively identified defendant as the person who robbed and assaulted her at trial. Similarly, the second victim testified that defendant ordered her into the car at gunpoint. Defendant drove to a secluded area where he robbed and sexually assaulted the second victim. Again, these incidents occurred during daylight hours. Finally, this victim was also able to identify defendant in a photographic array, and also identified defendant as the person who robbed her and assaulted her at trial. Because there was significant other evidence to support defendant's convictions, we question the effect that the statistical analysis evidence would have had on the trial. Accordingly, defendant has failed to overcome the presumption that the challenged inaction was trial strategy. *Leonard, supra* at 592.

Defendant also argues, in propria persona, that trial counsel was ineffective for failing to require the prosecution to establish that generally accepted laboratory procedures were followed. Defendant relies on *People v Adams*, 195 Mich App 267, 277; 489 NW2d 192 (1992), mod on other grounds 441 Mich 916 (1993), to support his argument. The *Adams* Court stated, "Given the overall acceptance of the technique in other jurisdictions, we hold that trial courts may take judicial notice of the reliability of DNA identification testing . . . [N]evertheless, before a trial court admits the test results into evidence, the prosecutor must establish in each particular case that the generally accepted laboratory procedures were followed." *Id*. Defendant merely states that trial counsel's failure to request the prosecution to establish that the generally accepted laboratory procedures were followed in this case rendered her ineffective. Defendant sets forth no challenge to the reliability of the testimony relating to the DNA evidence and has not demonstrated that the expert did not follow proper procedures in conducting the DNA tests. Finally, there was other significant evidence supporting defendant's convictions. Accordingly, defendant has failed to overcome the presumption that the challenged inaction was trial strategy. *Leonard*, *supra* at 592.

Defendant next argues, in propria persona, that trial counsel was ineffective for failing to request DNA testing of the car utilized in both assaults because the assailant's DNA could have been left in the car, which would have exonerated defendant. In *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996), this Court held that reversal was not required where the trial court refused to order DNA testing of a semen stain on the complainant's underwear. The *Sawyer* Court determined that the defendant's exculpatory theory about the evidence was highly speculative. *Id*. Similarly, we find defendant's exculpatory theory about the evidence highly speculative. In light of the significant identification evidence presented at trial and the speculative nature of defendant's newly proposed defense theory, we conclude that trial counsel was not ineffective on this basis. Additionally, we conclude that defendant has failed to demonstrate that there were cumulative errors requiring reversal of his convictions.

II. Sufficiency of the Evidence

Defendant next contends that there was insufficient evidence to support his convictions of first-degree criminal sexual conduct while armed and armed robbery, on the basis there was no evidence that defendant was armed at the time of the sexual assaults or the robberies. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

MCL 750.520b(1)(e) states, "A person is guilty of criminal sexual conduct in the first-degree if he or she engages in sexual penetration with another person and if . . . [t]he actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon." In *People v Proveaux*, 157 Mich App 357, 361-362; 403 NW2d 135 (1987), this Court determined that the defendant was "armed" for purposes of MCL 750.520b(1)(e) when defendant had possession of a knife when he began his assault on the victim. *Id*. at 362. Eventually, the victim somehow got the knife out of the defendant's hand and threw it toward some bushes or the street. *Id*. at 359-360. The defendant hit the victim, and had sexual intercourse with the victim. *Id*. at 360. This Court stated the following:

> It is enough that defendant began the assault with a knife, putting the victim in fear and traumatizing her. The sexual penetration was part of a continuing event beginning with the armed assault. Undoubtedly, the Legislature intended to discourage the use of weapons by elevating forcible sexual penetration to a first-degree offense when the offender is armed. The possession of a weapon makes the sexual assault more reprehensible, increases the victim's danger, and lessens the victim's chances of escape. *People v Hurst*, 132 Mich App 148, 152; 346 NW2d 601 (1984). The statutory purpose of a higher penalty for the more reprehensible crime must continue through the assault even if the accused is disarmed in this fashion. A policy that prevents conviction of the first-degree offense merely because at some point during the criminal transaction the offender lost his weapon would not be consonant with the Legislature's intent. A rule requiring actual or constructive possession of the weapon through the course of the sexual assault would mean that a defendant could first subdue the victim with a weapon and then discard it before actual penetration. Such a rule would mean that the victim's actions in defending herself lessened the crime's seriousness. [*Proveaux*, *supra* at 362-363.]

In accordance with the *Proveaux* Court's reasoning, we find that, although the two victims did not see the weapon during the time of the sexual assaults, this had no effect on whether the elements of first-degree criminal sexual conduct had been met. The first victim testified that while she was waiting for her friend in the party store parking lot, defendant entered the car and put a revolver to her neck. The victim testified that she was scared, and that defendant held the revolver to her neck as he directed her to drive to a secluded construction site. The second victim testified that defendant pointed a revolver at her, told her to get into the car, and threatened to kill her. Defendant later told the second victim that he would not hurt her if she did what he said. Although neither victim saw the gun during the sexual assault, the fact that defendant began the assault with a weapon and put them in fear is sufficient to support the charge. *Proveaux*, *supra* at 362.

Furthermore, in the instant case, there was no evidence that defendant no longer had the weapon in his possession or that either victim disarmed defendant. "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Whitehead*, 238 Mich App 1, 14; 604 NW2d 737 (1999). Thus, the sexual assault of each victim was part of a continuing event beginning with an armed assault. See *Proveaux*, *supra* at 362. Accordingly, after reviewing the evidence in a light most favorable to the prosecution, we find there was sufficient evidence to support defendant's convictions of first-degree criminal sexual conduct under MCL 750.520b(1)(e).

Similarly, the evidence was sufficient to support defendant's convictions for armed robbery. "The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon." *People v Watkins*, 247 Mich App 14, 33; 634 NW2d 370 (2001). "The offense of assault requires proof that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Id*. In the case involving the first victim, the assault occurred when defendant put the gun to the victim's neck and instructed her to drive and the felonious taking of the victim's property

occurred when defendant took her money without permission. Although the victim testified that she did not know where the gun was at the time her money was taken, the jury could infer that defendant retained possession of the gun at that time of the robbery as there was no indication that defendant disposed of the gun or was otherwise deprived of the possession of the gun.

The second victim testified that defendant ordered her into the car at gunpoint and threatened that he would not hurt her if she did what he said. This testimony was sufficient to establish an assault. The felonious taking element was demonstrated by the victim's testimony that defendant took her money without permission. Although the second victim also did not know where the gun was located at the time of the taking, the jury could infer that defendant retained possession of the gun at the time of the robbery since again there was no indication that defendant disposed of the gun or was otherwise deprived of the possession of the gun at the time of the robbery. Accordingly, there was sufficient evidence to support defendant's convictions of armed robbery when reviewing the evidence in the light most favorable to the prosecution. *Whitehead, supra* at 14.

III. Double Jeopardy

Defendant argues that his six first-degree criminal sexual conduct convictions constitute multiple punishments for the same offense in violation of double jeopardy. We agree.

In Docket No. 232192, defendant was charged with four counts of first-degree criminal sexual conduct on the basis of two sexual assaults involving penetration supported by alternative theories, MCL 750.520b(1)(c) (sexual penetration occurring during the commission of a felony) and MCL 750.520b(1)(e) (actor armed with a weapon). In Docket No. 232191, defendant was charged with two counts of first-degree criminal sexual conduct, on the basis of one sexual assault involving penetration supported by alternative theories, MCL 750.520b(1)(c) (sexual penetration occurring during the commission of a felony) and MCL 750.520b(1)(e) (actor armed with a weapon). Defendant was convicted by a jury of a total of six counts of first-degree criminal sexual conduct.

In *People v Mackle*, 241 Mich App 583, 601; 617 NW2d 339, this Court held that "[t]he double jeopardy prohibition includes subjecting a defendant to multiple punishments for a single offense." The *Mackle* Court noted the following:

> In *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), this Court concluded that separate convictions and sentences for both premeditated murder and felony murder, both of which arose from a single instance of criminal conduct, violated the rule against double jeopardy. *Id*. at 220. The Court remedied the double jeopardy problem by directing the lower court to amend the judgment of sentence to reflect a single conviction and a single sentence for a crime that was supported by two separate theories. *Id*. at 221-222. We likewise remand this case to the trial court so that it may reflect that two alternate theories supported each of the six counts of CSC I. Accordingly, we further direct the trial court to vacate six of defendant's twelve sentences for CSC I. [*Mackle, supra* at 601.]

We find the *Mackle* "remedy" applicable to this case. Therefore, we remand this case to the trial court to amend the judgment of sentence to reflect that two alternate theories supported defendant's conviction on two counts in Docket No. 232192, and one count in Docket No. 232191. Additionally, we further direct the trial court to vacate two of defendant's sentences for first-degree criminal sexual conduct in Docket No. 232192, and one of defendant's sentences for first degree criminal sexual conduct in Docket No. 232191..

Additionally, although not raised on appeal, we find that defendant was improperly sentenced to one count of kidnapping, MCL 750.349, in Docket No. 232192. Defendant was not charged with kidnapping, and the jury was not instructed regarding the elements of kidnapping for the charges relating to either victim. Finally, the verdict forms did not contain a count for kidnapping. MCR 6.429(A) provides, "[t]he court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." In *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994), the Michigan Supreme Court stated, "[w]here a court imposes a sentence that is partially invalid, the Legislature has provided that the sentence is not to be 'wholly reversed and annulled,' but rather is to be set aside only 'in respect to the unlawful excess.'" *Id*., quoting MCL 769.24. In accordance with *Thomas* and MCR 6.429(A), we also instruct the trial court to vacate defendant's sentence for kidnapping in Docket No. 232192. MCR 7.216(A)(7).

We affirm defendant's convictions and remand this case for correction of defendant's sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder